United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

72

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

SARA McCULLOUGH,

Appellant,

v. No. 23,623

JOHN R. PINKETT, INC.,

Appellee.

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APPEAL FROM AN ORDER OF THE
DISTRICT OF COLUMBIA COURT OF APPEALS

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*Indicates authorities primarily relied upon

STATEMENT OF ISSUE PRESENTED

May a tenant in possession of a premises intervene in a suit for possession of that premises in order to vacate a default judgment secured by the landlord for possession of the premises?

This case was previously before this Court on Mrs. McCullough's emergency application for a mandatory injunction and stay of eviction (motion granted, Nov. 6, 1969, per Wright & Robinson, JJ.; Tamm, J., dissenting) and her petition for allowance of an appeal (review granted, Feb. 10, 1970, per Bazelon, C.J., & Leventhal, J.; Robb, J., dissenting).

STATEMENT OF THE CASE

This is a case in which appellant, Mrs. Sara McCullough, is seeking reversal of trial and lower appellate court decisions which have prevented her from intervening into an action in order to assert her right to possession of her property. 1/

1/ Because the District of Columbia Court of Appeals acted with unusual dispatch in dismissing Mrs. McCullough's appeal, it disposed of her case before the trial court record had been assembled and sent to it. Consequently, when Mrs. McCullough appealed to this Court, only that portion of the full record which was before the D.C.C.A. when it dismissed the appeal was certified to this Court. This meant that certain fundamental elements of the record were left behind, including plaintiff's complaint, affidavits of both parties, the relevant written lease, and the docket entries of the trial court, which constitute its orders in the case. [No answer was filed by Mrs. McCullough because she was not permitted to intervene in defense of the suit.] (fn.1/ con't.d).

Mrs. McCullough's appeal from the trial court's denial of leave to intervene in a suit for possession of her premises was dismissed by the District of Columbia Court of Appeals (D.C.C.A.). This Court subsequently granted Mrs. McCullough leave to appeal from the order of dismissal.

Sara McCullough, and her four children, moved into Apartment 2C at 1203 Trenton Place, S.E., Washington, D.C., on January 1, 1968.[2/] The lease[3/] under which Mrs. McCullough took possession was signed by appellee's assignor (Girard & Company, a rental management firm) and one Alexander Green, an acquaintance of Mrs. McCullough. Mr. Green never in fact resided at the premises, nor did he make any of the rental payments. Instead, Mrs. McCullough made the rental payments for the apartment, at first to respondent's assignor and later to an escrow fund set up by numerous tenants at the Trenton Terrace Apartments.[4/]

John R. Pinkett, Inc. (Pinkett) brought a suit for possession of Apartment 2C against Alexander Green in August 1969 in

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(fn.1/ con't.d).
These documents have been lodged with this Court. The facts contained therein which are relevant to this appeal are undisputed.

2/ See Lodged Affidavit of Sara McCullough.

3/ See Lodged Lease.

4/ See Affidavit of Sara McCullough. A discription of this escrow arrangement can be found in this Court's opinion in Dorfmann v. Boozer, ____U.S. App. D.C.____, 414 F.2d 1168 (1969).

the Landlord and Tenant Branch of the District of Columbia Court of General Sessions.[5] On September 2, a default judgment was entered for Pinkett. Mrs. McCullough first learned of this suit and default on September 17 when she received a writ of restitution ordering that the premises be vacated.[6]

Two days later she sought to quash the writ of restitution and vacate the default judgment. As her grounds for this relief, Mrs. McCullough averred that she had not been given notice of the suit for possession of her apartment. She stated, "At no time did I receive or observe a copy of a complaint or of a default judgment in this case." If she were allowed to vacate the default and defend on the merits, Mrs. McCullough stated that, in addition to the jurisdictional defense, she believed that the existence of certain housing code violations would constitute a defense to the action. She also stated that she would raise the defense of retaliatory eviction.[7]

At the hearing on her motion, she was denied leave to intervene in the case because the trial court felt she "had no standing."[8] Her motion to vacate the default and quash the

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5/ See Lodged Complaint.

6/ See Lodged Affidavit of Sara McCullough.

7/ See id.

8/ See the Lodged Docket Entries made by Goodrich, J., on September 26, 1969 and October 2, 1969. Mrs. McCullough was (fn.8/ con't.d).

writ was consequently denied.

Mrs. McCullough subsequently appealed this ruling to the District of Columbia Court of Appeals. Soon thereafter, Pinkett moved to dismiss Mrs. McCullough's appeal, urging that she, as an unsuccessful applicant in the trial court for intervention, could not seek to gain intervention by appeal in order to enter the case to attack the default judgment. Mrs. McCullough opposed this motion. The D.C.C.A. apparently agreed with the landlord's position; it dismissed the appeal, but without stated reasons.

A petition for leave to appeal this dismissal followed. While it was pending, respondent forcefully evicted Mrs. McCullough, her family, and her possessions from the premises. On November 6, 1969, this Court ordered respondent to restore Mrs. McCullough to her apartment. It also stayed any further eviction pending the petition, conditioned upon Mrs. McCullough's payment of future rent to Pinkett. On February 10, 1970, this Court granted Mrs. McCullough leave to prosecute her appeal from the D.C.C.A.'s order.

(fn.8/ con't.d). also viewed as lacking "standing in this action" by Halleck, J. See Lodged Docket Entry of October 9, 1969.

SUMMARY OF ARGUMENT

The District of Columbia Court of Appeals erred in dismissing Mrs. McCullough's appeal. She was entitled to intervene as of right in the suit for possession of her apartment which appellee brought in the Landlord and Tenant Branch of the Court of General Sessions. That court is bound by Federal and General Sessions Civil Rules 24(a)(2), and Mrs. McCullough, as the tenant in possession of the premises in question, had a sufficient interest in the cause of action to allow her to intervene. Under Rule 24(a)(2), her intervention should have been allowed even though she sought to vacate a default judgment for possession which appellee had attained, thereby "attacking a prior court decree." The denial of leave to intervene for this purpose was appealable, and the trial judge's ruling should have been reversed as being contrary to law.

ARGUMENT

APPELLANT WAS ENTITLED TO INTERVENE, FOR THE PRIMARY PURPOSE OF VACATING A DEFAULT JUDGMENT, INTO THE SUIT FOR POSSESSION OF HER PREMISES

A. Appellant's Right to Intervene in the Landlord and Tenant Branch is Established by Federal and General Sessions Civil Rules 24.

The General Sessions Court judge ruled that Sara McCullough

was not entitled to intervene in her landlord's suit for possession of her apartment because she lacked "standing to sue." It was additionally argued by the landlord that Mrs. McCullough was further precluded by the fact that the rules for the Landlord and Tenant Branch do not provide for intervention. The issue of whether intervention can be had in this special court would appear to be the threshhold hurdle for Mrs. McCullough. If intervention is impermissible in the Landlord and Tenant Branch for all nonparties to a suit, then Mrs. McCullough may not intervene in that court whether or not she desires to impeach its prior decree by vacating a default judgment.

None of the various Landlord and Tenant Branch rules provides for intervention. L & T Rule 11, which applies many of the General Sessions Rules to the Landlord and Tenant Branch, fails to specifically incorporate General Sessions Civil Rule 24, the rule providing for intervention in the parent court. Thus, perhaps by oversight, no procedure for intervention into a landlord and tenant action has been explicitly established.

Appellant nevertheless contends that G.S. Rule 24 applies in her case even though it has not been made specifically applicable to the Landlord and Tenant Branch. The absurd rigidity which would result from denying third parties the right to intervene in such actions compells a

broad reading of the applicable landlord and tenant rules.

Landlord and Tenant Rule 11 should not read as an exclusive listing of those General Sessions rules which are operative in the Landlord and Tenant Branch. Nothing in Rule 11's language would require such a reading. The adoption of this narrow construction would lead to harmfully restrictive results. No one would be able to gain discovery in this court.[9] No one could avail himself of the full procedures for vacating default judgments.[10] No one could even act to amend a pleading.[11]

The District of Columbia Municipal Court of Appeals seems to have overcome the logical absurdity of the lack of a procedure for intervention in landlord and tenant actions. In Schwaner v. George, 56 A.2d 161 (1947), that court permitted a party to intervene on the defendant-tenant's behalf. It did so, however, without directly addressing the issue.

Appellant urges that the better view should clearly be to apply to the Landlord and Tenant Branch all of those General Sessions procedures which, though not listed in L & T Rule 11, are nevertheless an intricate part of any

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9/ Compare L & T Rule 11 with G. S. Rules 26-37.
10/ Compare L & T Rule 11 with G. S. Rule 55.
11/ Compare L & T Rule 11 with G. S. Rule 15.

fair and just court proceeding, albeit a summary proceeding. There can be no meaningful reason why intervention should not be permissible in these cases.

The Landlord and Tenant Branch, however parochial its summary procedures might seem, should be willing--and its litigating parties should be entitled--to enjoy the administrative benefits of the liberal modern-day usage of intervention. Intervention helps avoid a multiplicity of suits.[12] It promotes finality of a third party's dispute and ensures a uniform result. It furthermore permits relevant viewpoints from additional perspectives to be digested by the court. The summary nature of the Landlord and Tenant Branch proceedings should in no way minimize the utility of the intervention process. It should be just as vital to the fair and efficient functioning of this court as to any other.

Any doubt as to the applicability of the intervention

12/ Mrs. McCullough could possibly have sought her relief by filing an original action. It would have been a cumbersome process, however, both for the parties and this jurisdiction's judicial system. Because the General Sessions Court has no original equitable power, she would have had to seek to enjoin an eviction and further prosecution of the suit for possession by filing an action in the District Court. The District Court would then have had to utilize its powers to enjoin a court of somewhat coordinate status. The judicial administration would further be strained by the time factors involved. Emergency disposition would have had to be requested in the District Court because Mrs. McCullough did not learn of the suit until she received the writ of restitution two days prior to the time on which it could have been acted upon. Required resort to this cumbersome process would be of benefit to no one.

device in Landlord and Tenant Branch proceedings should be put to rest by the import of this Court's ruling in McKelton v. Bruno, D.C. Cir. No. 22,628, February 17, 1970. In McKelton, the Court was presented with the problem of identifying the proper standards under which the D.C.C.A. should pass upon in forma pauperis motions. McKelton found its answer in D.C. Code §13-101 (1967), which requires the rules of the D.C.C.A. and the General Sessions Court to "conform as nearly as may be practicable to the forms, practice, and procedure prescribed by the Federal Rules of Civil Procedure. . ." The McKelton Court therefore looked to the Federal Rules of Appellate Procedure for the proper guidelines. By analogy in this case, Federal Rule of Civil Procedure 24 should have been conformed with by the trial judge.

Mrs. McCullough's position on this issue is further bolstered by a final approach to this issue. This Court has recently stressed how the Constitution's equal protection requirements must impel the courts of this jurisdiction to provide equal procedural rights to all equally situated litigants. In Lee v. Habib, D.C. Cir. Nos. 22,203-04, Jan. 22, 1970, the Court, guided by constitutional considerations, interpreted relevant statutory authority so as to give General Sessions litigants the same access to free transcripts as District Court litigants are permitted. This interpretation was

impelled[13] not only by a desire to avoid an arbitrary distinction between wealthy and indigent litigants, but also to avoid a similar classification between those sued in the District Court and those sued in the General Sessions Court.[14] As the Lee court noted, landlords can seek to gain possession of their premises by bringing an action for ejectment in the District Court, rather than suing for possession in the Landlord and Tenant Court pursuant to D.C. Code §45-910. If Mr. Lee had been sued in the District Court, he could have applied for a free transcript. Because the court questioned "whether Congress could constitutionally deprive him of that right because his landlord chose to proceed against him in the Court of General Sessions," the result in Lee was compelled.

By analogy, the same constitutional defect which would adversely affect Mrs. McCullough in this case must compel this Court to rule that she has that same procedural right which would be available to a District defendant--the ability to intervene as of right under Rule 24(a)(2).

B. Appellant Met the Requirements for Intervention of Federal and General Sessions Civil Rules 24.

If Federal and General Sessions Civil Rules 24 are

13/ See Lee v. Habib, supra, slip op. at 19.
14/ Id. at 23.

therefore applicable to Landlord and Tenant Branch proceedings, it seems clear that Mrs. McCullough has a sufficiently distinct interest in the suit for possession of her property to intervene as of right under Rule 24(a)(2).

The trial judge held that Mrs. McCullough could not intervene because she "had no standing to sue." Although the concept of standing is mildly analogous to that of intervention,[15/] Mrs. McCullough was not seeking to bring an affirmative action. She was merely attempting to maintain possession of her apartment. Even if "standing" were at issue, it would surely be that the resident of an apartment has an easily sufficient property interest in that premises to sue to protect that interest.

The proper standards governing intervention are those explicitly set forth by Rule 24. Anyone shall be permitted to intervene as of right in an action when he:

15/ See, e.g., this Court's terminology in Nuesse v. Camp, 128 U.S. App. D.C. 172, 177-78, 385 F.2d 694, 699-700 (1967). The logic behind both principles, however, would seem to require a stricter standard of those seeking standing to sue as plaintiffs than for those seeking to intervene. Two major policy restrictions which work to deny parties standing are (1) a desire to have suits brought by parties sufficiently interested in them so as to adequately represent the plaintiff's position in the adversarial process, and (2) a desire to minimize litigation by precluding parties with minimal interests from bringing academic issues into the courts. An intervenor does not threaten either of these interests because the suit about which he is concerned has already been instituted by a presumably proper party.

> claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Judge Leventhal, speaking for this Court, has summarized Rule 24 as demanding of the applicant for intervention three necessary requirements:

> (i) an interest in the transaction,
> (ii) which the applicant may be impeded in protecting because of the action,
> (iii) that is not adequately represented by others.

Neusse v. Camp, supra, 128 U.S. App. D.C. at 177, 385 F.2d at 699.

Mrs. McCullough's critical interest in the property subject to the suit seems obvious. She asserted that she resided at the premises of which Pinkett sought possession. What greater practical interest can there be than the desire of an individual residing in a home to maintain her possession of that home?

By the time Mrs. McCullough heard of the suit for possession of her apartment a default had already been entered and her eviction was imminent. Because of the default judgment, Pinkett was about to be permitted to gain possession of Mrs. McCullough's home. Because of the suit for possession, Mrs. McCullough was therefore surely impeded

from protecting her property rights in her apartment.

Because the named defendant in Pinkett's suit for possession did not appear to defend in the action, he was unable to adequately represent Mrs. McCullough's interests in the property.

Without further ado, Sara McCullough submits that her interest in the suit for possession was clearly sufficient to permit her to intervene as of right under Rule 24.

C. Appellant, as an Intervenor, Is Entitled to Move to Vacate the Default Judgment Relating to Her Property.

In dismissing Mrs. McCullough's appeal, the D.C.C.A. apparently relied upon an old maxim that "intervention will not be allowed for the purpose of impeaching a decree already made."[16/] The cases cited by appellee to the D.C.C.A. to support this proposition were Connor v. Peugh's Lessee, 59 U.S. (18 How.) 394 (1856), and Union Provision & Distributing Co. v. Thomas J. Fisher & Co., 49 A.2d 85 (D.C. Mun. App. 1946).

Of the two cases, Union Provision most squarely deals with this issue.[17/] It involved an attempt by an individual who was the president of two corporations to intervene in the name of one corporation and set aside a judgment which he had consented to in his capacity as president of the other corporation. The Court of Appeals reached the merits of the motion to set aside the judgment and held that the president and the intervening corporation were estopped from attacking the consent judgment. The court also ruled against

16/ United States v. California Coop. Canneries, 279 U.S. 553, 556 (1929).

17/ The relevancy to this appeal of the Connor opinion is discussed in part D infra.

appellant on several additional grounds: (1) the motion to vacate was tardy and made for delay; (2) appellant had not intervened in the action; (3) if appellant were deemed an applicant for intervention, it had not established its right to intervene; and, finally, (4) "intervention will not be allowed for the purpose of impeaching a decree already made,"[18] i.e., the consent judgment.

Based on the merits of the case and the corporation president's apparent lack of good faith, the result reached in Union Provision seems entirely commendable. Detracting from this opinion, however, is the court's reference to the old prohibition against impeaching a prior decree. It is submitted that that dictum has no present, viable, legal basis and is accordingly incorrect.

Prior to the promulgation of the current Federal Civil Rule 24, the generally applicable federal guidelines for intervention were those set forth in Federal Equity Rule 37:

> Anyone claiming an interest in the litigation may at anytime be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.[19]

18/ 49 A.2d at 87.
19/ See 3B Moore, Federal Practice ¶24.05 (2d ed. 1969).

Old Rule 37's final qualifying clause and its similar predecessors were interpreted to forbid an intervening party from challenging the legality of the procedures which took place prior to intervention.[20] For example, an intervenor was not permitted to challenge the court's jurisdiction over the lawsuit in which he had intervened.[21] Another consequence was the once well-established rule "that intervention will not be allowed for the purpose of impeaching a decree already made."[22] In addition to the notion that intervening parties should not be permitted to contest the prior proceedings of the court which allowed it to intervene, this latter holding rested upon a desire to avoid undue delay and to set forth a rule of laches.[23]

When the federal rules were revised in 1938, however, the subordination requirement was specifically eliminated. By elemental rules of construction it therefore seems apparent that this restriction on intervention was intended to be eliminated.[24] The subordination restriction has

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20/ See generally id. ¶24.16[1].
21/ See generally id. ¶24.16[2].
22/ United States v. California Coop. Canneries, 279 U.S. 553, 556 (1929) See 3B Moore, supra, ¶24.16[5].
23/ Id.
24/ See 3B Moore, supra, ¶24.16, p. 593.

nevertheless lingered on, gaining reference in several lower court opinions, similar to its inclusion in Union Provision. These opinions generally reiterate the old rule without recognizing or discussing the impact of new Rule 24.[25] Others seem to use the rule to buttress their concern that an intervenor will disrupt all that has thus far taken place in a particular action.[26] Those courts which have realized that new Rule 24 must have a significant impact on the viability of the old rule have nevertheless failed to fully grapple with the problem.[27]

25/ See, e.g., Specmade Products, Inc. v. Barnett, 247 F. Supp. 75 (N.D. Ga. 1964), aff'd, 354 F.2d 229 (5th Cir. 1966); Godfrey L. Cabot, Inc. v. Binney & Smith Co., 46 F. Supp. 346 (D. N.J. 1942); Hofheimer v. McIntee, 179 F.2d 789 (7th Cir. 1950).

26/ See Becton v. Greene County Bd. of Educ., 32 F.R.D. 220, 223 (D.N.C. 1963); Stell v. Savannah-Chatham County Bd. of Educ., 255 F. Supp. 88 (S.D. Ga. 1966); Galbreath v. Metropolitan Trust Co., 134 F.2d 569 (10th Cir. 1943); In re V-I-D, Inc. 177 F.2d 234 (7th Cir. 1949), cert. denied, sub. nom. 339 U.S. 904 (1950); Wright v. The Praetorians, 63 F. Supp. 839 (N.D. Texas 1943), aff'd, 152 F.2d 856 (5th Cir. 1945). See generally 3B Moore, supra, ¶24.16[1], p. 592.

27/ See In re Credit Service, Inc., 30 F. Supp. 878 (D. Md. 1940). But see Keystone Freight Lines, Inc. v. Pratt Thomas Truck Line, Inc., 37 F. Supp. 635 (W.D. Okla. 1941), dismissed as moot, 123 F.2d 326 (10th Cir. 1941), which declared:

> it may be presumed that the term "intervention" was used in the new rules with the judicial construction previously given the term by our highest court.

37 F.Supp. at 639, referring to United States v. California Coop. Canneries, 279 U.S. 553 (1929).

The weight of reasoned authority, however, fully recognizes that the subordination rule was omitted from Rule 24 for a purpose, namely, to eliminate it as a restriction upon intervention. The treatises have regarded this more permissive interpretation as "the better view."[28] Higher courts have tacitly reached the same conclusion. In SEC v. United States Realty & Improvement Co., 310 U.S. 434 (1940), the Supreme Court, without mentioning the old subordination requirement, held that the District Court did not abuse its discretion in permitting the Commission to intervene in a bankruptcy proceeding even though its sole purpose was to move to dismiss the action. Similarly, the Second Circuit, in Park & Tilford, Inc. v. Schulte, 160 F.2d 984, 989 n.1, cert. denied, 332 U.S. 761 (1947), ruled that an intervenor need not be estopped from contradicting previous positions that had been taken in the case.[29] Equity Rule 37's subordination stricture seems also to have been discarded by this and other circuit courts which have held that intervention is permissible after a judgment on the merits has been entered.[30]

28/ 2 Barron & Holtzoff, Federal Practice & Procedure §591, p. 355-56 (1961 Wright ed.). See 3B Moore, supra, ¶24.16[1], p. 593.

29/ See also Hartley Pen Co. v. Lindy Pen Co., 16 F.R.D. 141 (S.D. Cal. 1954).

30/ See, e.g., Smuck v. Hobson, 132 U.S. App. D.C. 372, 408 F.2d 175 (1969); Zuber v. Allen, 128 U.S. App. D.C. 297, 387 F.2d 862 (1967); Wolpe v. Poretsky, 79 U.S. App. D.C. 141, 144 F.2d 505 (1944); Pellegrino v. Nesbit, 203 F.2d 463 (9th Cir. 1953). The highest state court in Arizona has ruled that intervention after default is permissible. Liston v. Butler, 421 P.2d 542, 548 (1967).

A party intervening solely for the purpose of appealing an adverse judgment surely is not subordinating his actions to the validity of that judgment.

The overly restricting effect which the subordination rule exerted too often worked to bring on an unfair result. This is amply demonstrated by the plight of the Eighth Circuit court prior to the 1938 rule change.[31] Faced with an "unpleasant chapter in the judicial history of this circuit," the court lamented that:

> If we could see any legal way in which we could, without doing violence to well-established rules of equity, set aside these judgments and permit the intervenors to contest the question of insolvency and the amount of attorneys' fees, we would do so, but in the condition of this record our hands are tied by Equity Rule 37.[32]

The subordination requirement seems to have served a single major purpose: to promote orderliness and finality. It prevented a judgment from being reopened and it prevented an intervenor from seeking reconsideration of issues already ruled upon by a trial court. Professor Moore has pointed out that the rule was probably designed to "preclude the intervenor from raising frivolous issues, attacking administrative orders already made, interfering with the general control

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31/ Whittaker v. Brictson Mfg. Co., 43 F.2d 485 (8th Cir. 1930).
32/ Id. at 489.

of litigation, and unduly delaying such litigation."[33] On the other hand, the rule fostered a multiplicity of actions arising from the same factual pattern, for the intervenor would have to bring an original action to seek his relief. If no such alternate route were available, then the rule could work a harsh injustice.

Modern Rule 24 seems so structured that the beneficial policies promoted by the subordination requirement can still be safeguarded, while its arbitrariness is avoided. If a party sits on his rights too long and fails to enter into a lawsuit at a sufficiently early date, Rule 24's timeliness provision can be invoked.[34] It indeed may be that an applicant for intervention after judgment must put forth a stronger showing of his need to intervene.[35] Specifically concerning the vacating of default judgments, Federal and General Sessions Civil Rules 55 and 60 provide procedures

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33/ 3B Moore, supra, ¶24.16[1], p. 592.

34/ General Sessions Civil Rule 24 provides:

> In exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

35/ See Smuck v. Hobson, supra, 408 F.2d at 181.

by which relief can be denied a tardy movant or one motivated by bad faith considerations. It furthermore need not be feared that the abolition of the subordination rule would permit an intervenor to open for reconsideration all that has taken place in litigation prior to his arrival. Reasonable restrictions upon what limitations the intervenor must operate under can surely be applied on a case by case basis, depending upon the degree of inconvenience that reconsideration of each item might incur.[36/]

In the instant case, Mrs. McCullough's motion would not cause undue disruption. Indeed, due to the default, no trial judge had ever been called upon to inquire into the case.[37/] Mrs. McCullough was not asking that many hours of judicial energy be vacated and exerted anew.

Nor would Mrs. McCullough severely threaten the policy needs of finality. She acted to vacate the default within two days of first hearing about this action. This response was timely and easily came within the guidelines which promote finality and are set forth in General Sessions Civil Rule 60 governing post judgment relief.[38/] Furthermore,

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36/ The Advisory Committee Note to the 1966 Amendment of Rule 24(a) stated:

> An intervention of right under the amended rule may be subject to appropriate conditions or restriction responsive among other things to the requirements of efficient conduct of proceedings.

37/ See Landlord & Tenant Rule 9(c).

38/ Rule 60(b) permits some grounds for vacation to be made within three months after judgments. The others must be [fn. 38/ con't.d]

permitting Mrs. McCullough to defend her case on the merits is a primary policy consideration that only can best be attained by allowing her to intervene.[39/] [40/]

Sara McCullough has shown nothing but good faith and reasonableness in her desire to intervene into the suit for possession of her premises. It is submitted that there are no valid policy reasons for denying her this right.

D. Appellant Was Entitled To Appeal Her Denial Of Leave To Intervene

The second case which was put before the D.C.C.A. as supposedly requiring the dismissal of Mrs. McCullough's appeal--and accordingly which might have been relied upon by that court--was Conner v. Peugh's Lessee, supra.

Conner dealt with a factual situation somewhat similar to that in the instant case (except that the tenant in possession's motion to intervene came several months after judgment had been entered). The trial judge had denied the tenant in possession's motions for leave to intervene and to vacate the judgment. He was upheld

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[fn. 38/ con't.d]. made within a reasonable time. Compare Fed. R. Civ. P. 60(b).

39/ See, e.g., Thorpe v. Thorpe, 124 U.S. App. D.C. 299, 301 364 F.2d 692, 694 (1966).

40/ Mrs. McCullough's cumbersome alternative to intervention is discussed at footnote 12 supra. Even if this alternative procedure were adequate, it would be no bar to her ability to intervene as of right in this case. Neusse v. Camp, supra, 128 U.S. App. D.C. at 180, 385 F.2d at 702.

on appeal. Because these motions were "application[s] to the sound discretion of the court," the Supreme Court ruled in rather cryptic fashion, that "on such a motion no appeal lies." 59 U.S. (18 How.) at 395.

If applicable to modern-day litigation, Conner would mean that no party seeking to intervene into a lawsuit could appeal a denial of that request. Similarly, the denial of a motion to vacate a judgment would not be appealable. Both of these propositions, however, are clearly not present-day law. The denial of a motion for leave to intervene as of right under Federal and General Sessions Civil Rules 24(a)(2) has explicitly been held appealable.[41/] Similarly, the denial of a motion to vacate judgment is reviewable for an abuse of discretion.[42/]

CONCLUSION

Appellant submits that her appeal in the court below fell prey to an outmoded principle which no longer has any place in modern procedural rules. As a consequence, the District of Columbia Court of Appeals erred in dismissing Mrs. McCullough's appeal. This case should be remanded

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41/ Brotherhood of R.R. Trainmen v. Baltimore & O.R.R., 331 U.S. 519, 524-25 (1947); Nuesse v. Camp, supra, 128 U.S. App. D.C. at 177 n.2, 385 F.2d at 699 n.2.

42/ See, e.g., Wise v. Herzog, 72 App. D.C. 335, 114 F.2d 486 (1940); Meadis v. Atlantic Construction & Supply Co., 212 A.2d 613, 615 (D.C.C.A. 1965).

to the D.C.C.A. with directions that that court reverse the trial court and permit Mrs. McCullough to intervene in the suit for possession of the premises in question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief and appendix was mailed, postage prepaid, to Annice McBryde, Attorney for Appellee, 615 F Street, N. W., Washington, D. C., on this 6th day of May 1970.

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JOHN R. PINKETT, INC.,

Appellee.

APPEAL FROM AN ORDER OF THE
DISTRICT OF COLUMBIA COURT OF APPEALS

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COUNTER-STATEMENT OF ISSUE PRESENTED

The issue raised on this appeal is whether the District of Columbia Court of Appeals (hereinafter referred to as D. C. C. A.) erred in dismissing an appeal from the trial Court's denial of a stranger's post judgment oral motion to intervene in a landlord-tenant action for possession.

This case was previously before this Court on the following matters: Appellant's Application for Mandatory Injunction and Stay of Eviction (motion granted, Nov. 6, 1969, per Wright & Robinson, J. J.; Tamm, J., dissenting) Appellant's Motion to Amend Prior Order (motion denied, Per Curiam, Jan. 13, 1970, Wright, Tamm & Robinson, J. J. J.); Appellant's Petition for Allowance of an Appeal (Review Granted Feb. 10, 1970, per Bazelon, C. J., & Leventhal, J.; Robb, J., dissenting); and Appellee's motion to dismiss Appeal as Moot (referred for consideration by the Division of this Court assigned to hear oral argument of this appeal on the merits, June 23, 1970, per Wright and Leventhal, J. J.; Robb, J. would grant Appellee's Motion)

COUNTER-STATEMENT OF THE CASE

The defendant-below,[1] not a party to this appeal, leased the subject premises from Appellee's assignor, effective Jan. 2, 1968. Appellant has always admitted that defendant leased the subject premises as tenant under a written agreement[2]. However, Appellant alleges that she, and not defendant resided in the premises continuously from the inception of defendant's tenancy and that she made four, or fewer, rent payments to the landlord and thereafter made " rent" payments to a credit union.

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1. Where reference is made to defendant hereinafter, Appellee refers to defendant-below who is not a party to this appeal. Appellant, the unsuccessful intervenor will be designated Appellant.

2. See paragraph 2, Lodged Affidavit of Sarah McCullough.

The unrebutted assertions in the Affidavit of Flaxie M. Pinkett[3] show that rent was received on behalf of defendant, only, until May 24, 1968, after which no payments were made, and that Appellant was informed through her previous attorney that Appellee could not create a relationship with Appellant unless Appellee was first released from its obligations to its lessee, defendant. Such release was not obtained and no landlord-tenant relationship was ever created between Appellant and Appellee.

Appellant received at the subject premises Appellant's thirty-day notice to quit, addressed to its lessee, defendant. Valid service of the subsequent complaint for possession in the action below was posted at said premises on August 15, 1969. Notwithstanding the notice and service of process, Appellant protests that she had no actual[5] notice of the action of eviction until September 17, 1969, when she received a Writ of Restitution addressed to Appellant's lessee. Judgment had been entered in that action for possession on September 2, 1969.

On September 26, 1969, twenty-two days after judgment had been entered and nine days after she had received the Writ of Restitution, Appellant orally moved the Court below to allow her to intervene therein. This oral motion, unsupported by testimony was denied without opinion.[6] From the order denying said oral motion to Intervene, Appellant appealed to the District of Columbia Court of Appeals. Appellee filed in that Court a Motion to Dismiss Appeal on the ground that the order appealed from was not an appealable order. The motion was granted and the appeal dismissed without opinion.

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3. See Lodged Affidavit of Flaxie M. Pinkett
4. See id. Paragraph 3.
5. Emphasis ours.
6. See, the Lodged Docket Entry made by Goodrich, J., on September 26, 1969.

On February 10, 1970, this Court granted Appellant leave to appeal from the D. C. C. A. 's ruling. Thereafter, Appellant voluntarily vacated the subject premises. Appellee, having sought only possession of real property from the outset, based upon the termination of a tenancy pursuant to statute, moved this Court to dismiss the appeal as moot. That motion is still pending for consideration by the Division of this Court assigned to hear argument of this appeal on the merits.

SUMMARY OF ARGUMENT

The District of Columbia Court of Appeals properly dismissed an appeal from the trial Court's denial of a stranger's oral motion to intervene, after judgment, in a suit for possession. While Rule 24 of the District of Columbia Court of General Sessions provides for intervention of strangers to an action under certain circumstances, said rule is specifically excluded from operation in summary proceedings in the Landlord and Tenant Branch of that Court.[7] Notwithstanding, it would appear that the trial Court could determine such a motion if properly served and sufficiently supported. In this case, the motion for intervention was made orally and after judgment. If Rule 24 were applicable, the attempted intervenor's motion was fatally defective for failure to comply with the requirements of part c of that Rule.

In her oral motion to intervene below, Appellant failed to establish her interest in the action as a tenant. Upon due consideration of the representations of counsel, the affidavits of Appellant and Appellee in the Court below, the trial Judge could not and did not presume an interest which was never established.

Where, as here, intervention is sought after judgment, specificity in establishing the intervenor's interest becomes more important. Having failed in her

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7. Landlord and Tenant Rule 11

untimely application to establish a legitimate interest in the proceeding. Appellant cannot complain that the Court abused its discretion in denying leave to intervene after judgment. In the absence of an abuse of discretion the trial Court's order denying said motion is not appealable. The D. C. C. A., having found no abuse of discretion by the trial Judge, properly dismissed the appeal.

ARGUMENT

APPELLANT, A STRANGER TO THE ACTION BELOW, ALTHOUGH AN OCCUPANT OF THE LEASED PREMISES, WAS NOT ENTITLED TO INTERVENE IN A SUIT FOR POSSESSION AFTER JUDGMENT HAD BEEN ENTERED FOR THE LESSOR AGAINST LESSEE AND A WRIT OF RESTITUTION SERVED THEREON, AND ACTION OF THE COURT THEREON IS NOT APPEALABLE.

A. Appellant's oral motion to intervene in the trial court, having been neither properly served nor sufficiently supported, was rightfully denied in the exercise of the Court's discretion.

Appellant's lengthy discussion in Section A of her brief concerning the possible adverse effects which would result from adherence to Rule 11 of the Rules of the Landlord and Tenant Branch of the District of Columbia Court of General Sessions, evades the issue for review by this Court. For, although as Appellant complains, Landlord and Tenant Rule 11 specifically excludes from operation in summary proceedings in that Court General Sessions Rule 24, providing for intervention, nevertheless, Appellant's oral motion for leave to intervene in the action below was, in fact, entertained by the trial Court and denied. Thus, Appellant's complaint cannot be that the trial Court misconstrued its authority under the restriction of Rule 11 to entertain such a motion, but rather that the Court abused its discretion in denying her motion. For, absent such an abuse of discretion, the trial Court's ruling upon the oral motion for leave to intervene, is not appealable in this jurisdiction[8], and the appeal from that ruling was accordingly dismissed

8. Connor v. Peugh's Lessee, 18 How. 394, 15 L. ed. 432(1856)

by the D. C. C. A.

Appellant first appeared in the trial Court upon a written motion to quash Writ of Possession and To Vacate Sua Sponte Default Judgment entered against defendant below, not a party to this appeal, her additional motion for a Temporary Stay of Writ of Execution with supporting affidavit and Plaintiff's (Appellee's) Opposition thereto with supporting Affidavit and attached Exhibit(the supporting affidavits and exhibit all designated by Appellant as part of the record on appeal). At that juncture, the trial Court appropriately denied both of Appellant's motions, finding that Appellant had no standing to vacate or stay the enforcement of a judgment to which she was not a party. It was only then that Appellant, for the first time, orally moved to intervene in the main action. The trial Court entertained the oral motion to intervene. In doing so, the Court necessarily considered the Affidavit of Sara McCullough, the Affidavit of Flaxie M. Pinkett, and the lease agreement attached thereto, and the representations of counsel made in open Court. The aforementioned affidavits and exhibit clearly establish that defendant, one Alexander Greene, was the lessee of the premises involved.[9] The trial Court could have reasonably reached no other conclusion but that Appellant had failed to make a showing of interest sufficient to warrant the trial Court allowing intervention after judgment.

In the exercise of its discretion with respect to the oral motion to intervene, the trial Court adhered to controlling case and statutory authorities. First, jurisdiction of the District of Columbia Court of General Sessions over summary suits for possession of real property under Section 45-910, D. C. Code(1967 ed) is explicitly limited to actions by landlord against tenant. Spruill v. Brooke,

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9. See paragraph 2, Lodged Affidavit of Sara McCullough, paragraph 3, Lodged Affidavit of Flaxie M. Pinkett and paragraph number 20, page 1 and the Fifth paragraph on page 2 of the lease agreement marked exhibit A.

68 A. 2d 204 (D. C. Mun. App. 1949). Thus, the wisdom of excluding the intervention mechanism of Rule 24 from the landlord and tenant rules becomes apparent, lest it be used as a device to enlarge the scope of the Court's jurisdiction beyond the statutory limitations. This statutory restriction has caused the D. C. C. A. to affirm a ruling of the trial Court that the wife of a lessee, not a party to the lease agreement between the lessee and his lessor, is not a tenant and need not be made party defendant in a suit for possession. Scott v. H. C. Smithy Co., 53 A. 2d 45 (D. C. Mun. App. 1947). Bound by the legal principles and the limited facts before it, the trial Court was compelled to conclude that Appellant proved no interest in the litigation which would warrant the Court's setting aside a decree already made and upon which execution had commenced, to allow Appellant, a stranger, to intervene. Accordingly, the D. C. C. A. could find no abuse of discretion and under the rule of Connor v. Peugh's Lessee, supra,[10] appropriately dismissed the appeal.

Since the trial Court entertained Appellant's oral motion for leave to intervene, the question Appellant attempts to raise concerning whether the Federal Rules of Civil Procedure and General Sessions Civil Rules 24 should apply to the Landlord and Tenant Court is not an issue arising out of the facts of this case and, therefore, should not be passed upon in this appeal. Therefore, any discussion of the impact of McKelton v. Bruno, D. C. Cir. No. 22, 628 Feb. 17, 1970, and Schwaner v. George, 56 A. 2d 161 (D. C. Mun. App. 1947) is irrelevant.

B. Appellant failed both procedurally and substantively to meet the requirements for intervention in the action below.

Assuming arguendo that Rule 24 of the Federal and General Sessions Civil

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10. The import of this decision is discussed more fully under Division C of this argument.

Rules apply to landlord and tenant proceedings, the rule must necessarily apply in its entirety. Appellant's oral motion for leave to intervene would thus have been fatally defective for failure to comply with section (c) of that Rule. Section (c) of Rule 24 requires that a person desiring to intervene serve upon all parties a written motion stating the grounds therefor and a pleading setting forth the claim or defense for which intervention is sought. Appellant neither filed nor served upon the parties the appropriate motion and operative pleading, a failure that has been held fatally defective. Miami County National Bank of Paola, Kansas v. Bancroft, 121 F. 2d 921, 926 (10 Cir. 1941). Section (c) of the Rule must be complied with whether or not the attempted intervenor seeks permissive intervention or intervention of right. Not only did Appellant fail to meet the procedural requirements of Federal and General Sessions Civil Rule 24, but also Appellant failed to demonstrate to the Court, an interest sufficient to allow her to intervene in the lawsuit. As Appellant points out in Section C of her argument, there has been a liberalization of the rules of intervention. However, this liberalization was not aimed at revising the nature of the applicant's interest required.[11] As Judge Wright pointed out in his opinion in the case of Hobson v. Hansen, 269 F. Supp. 401 (D. D. C. 1967), "... still required for intervention is a direct, substantial, legally protectable[12] interest in the proceeding. A careful reading of this Court's opinion in the case of Smuck v. Hobson, 132 U.S. App. D. C. 372, 408 F. 2d 175 (1969), reveals that while the Court seemed to outline a loose construction of the rules of intervention, it tenaciously held to the requirement of a realistic nexus between the interests of the intervenors and issues involved. For this reason, the parent-intervenors were not permitted to challenge certain portions of the lower Court's decree because they had no standing to do so. Thus, it is apparent that the mere naked assertion that

11. See 3B Moore, Federal Practice, 24.09-1
12. Emphasis ours.

one has an interest in the action is not sufficient. Rather, the burden is upon the attempted intervenor to demonstrate a legitimate interest in the proceeding.

Appellee contends that in the instant action such an interest could not be shown first, because of the absence of any conventional relationship of landlord-tenant between Appellant and Appellee. D. C. Code §45-910, Spruill v. Brooke, supra., and Scott v. H. G. Smithy Co., Supra. Second, the trial Court reasonably could not help but conclude, from the evidence before it, that Appellant lacked any independent right to occupy Appellee's real property and Appellant claimed no derivative right to occupy the property by reason of her relationship with the lessee. Even if she had made such a claim, her remedy could only have been against defendant-below and it could not have been asserted against the owner of the real property to whom she was a stranger. Therefore, Appellant had no interest which could have been legally protected by the Court had she been allowed to intervene.

The rule for intervention after judgment is set forth in Baron and Holtzoff, Federal Practice & Procedure, Vol. 2 §544. "Intervention may be allowed after a final judgment or decree if it is necessary to preserve some right which cannot otherwise be protected, but such intervention will not be permitted unless a strong showing is made." [13] The requirement of a strong showing by the attempted intervenor after judgment was recognized by this Court in the case of Smuck v. Hobson, supra.

In the case at bar, Appellant did not even make an effort to follow the minimal procedural requirements to establish her claim of interest. Additionally, the facts relied upon to support her oral motion to intervene, as set forth in her affidavit, did not establish any right in her to forestall a

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13. Emphasis ours.

judgment arising out of the case between two contracting parties. Thus, Appellant failed to meet the "heavy burden" placed upon her to establish an interest. When one fails to clear this first hurdle, the issue of the ability to protect one's interest without intervention and adequate representation in the litigation by others, cannot be reached.

C. Appellant's oral motion to intervene after judgment in an action for possession, was addressed to the sound discretion of the trial court, which appropriately denied same.

The corresponding section of Appellant's argument upon this point, again misconceives the issue raised by the facts and decisions of the Court below. Under Section C, Appellant again suggests to the Court the relaxation of the intervention mechanism intended by the current Federal Civil Rule 24. This discussion ignores the only possible issue raised here and discussed in the previous section of Appelle's brief, that this liberalization of the rule was not intended to and did not eliminate the requirement that the intervenor have a legitimate right or interest in the litigation. Smuck v. Hobson, supra. It further evades the fact that Appellant's oral motion for leave to intervene was entertained and passed upon by the trial Court. Thus, the only real issue appropriate for consideration at this point is whether that motion was properly denied. Necessarily, the Appellate Court was guided in passing upon the propriety of the trial Court's decision by two salient decisions in this jurisdiction. First, it has been the federal rule in this jurisdiction since 1856 that an application by a tenant in possession for leave to intervene, after judgment for possession in an ejectment action has been entered for plaintiff and writ of possession served upon the tenant in possession, is addressed to the sound discretion of the court, and the action of the court thereon is not appealable. Connor v. Peugh's Lessee, supra. (The Court granted a motion

to dismiss an appeal taken by the tenant in possession from the refusal of the District of Columbia lower Court judge to grant the tenant's motion to intervene.) The Connor decision was followed by the D. C. C. A. which held this rule applicable to landlord-tenant proceedings. Union Provision &D Corp. v. Thomas J. Fisher & Co., 49 A. 2d 85 (D. C. Mun. App. 1946). The facts of that case are startlingly similar to those of the instant case. There, as here, a landlord sued his lessee for possession of real property and obtained a judgment for possession. After a writ of restitution had been issued, a stranger corporation filed a motion in the same action to set aside the judgment and to vacate the writ of restitution. The motion was supported by an affidavit stating that at the time the suit was filed, and continuously thereafter, the premises had actually been occupied by the stranger corporation. The trial judge denied the motion to set aside the judgment. From that denial, the stranger corporation appealed, to the D. C. C. A. The landlord filed a motion to dismiss the appeal on the ground that the order appealed from was not an appealable order. The D. C. C. A. held that the motion to set aside the judgment had been addressed to the sound discretion of the trial judge and his order denying it was not an appealable order.

The critical phraseology in both these opinions, but apparently overlooked by Appellant, is that such motions are addressed to the sound discretion of the trial court. At that level, the attempted intervenor has an opportunity to demonstrate through relevant testimony and other evidentiary procedures whether or not he indeed had an interest in the litigation. The trial court is peculiarly well situated to carefully scrutinize and assess such evidence to determine whether a sufficient showing of interest is made to warrant setting aside the decree. In the case at bar, in view of the evidence before the trial

court, the jurisdictional limitations upon that Court in landlord and tenant actions and the controlling legal precedents, all previously discussed herein, the trial court did not abuse its discretion in denying Appellant's oral motion to intervene after judgment.

D. Since Appellant's oral motion to intervene was a matter addressed to the trial court's discretion, the order denying same is not appealable.

The jurisdiction of the Appellate Court to consider an appeal from an order denying intervention depends upon the nature of the applicant's right. Absent an absolute right to intervene, the matter is addressed to the sound discretion of the trial court and where there is no abuse of discretion, the order is not appealable. Connor v. Peugh's Lessee, supra; Brotherhood of R. R. Trainmen v. Baltimore & O. R. R., 67 Sup. Ct. 1387, 331 U. S. 519, 91 L. ed. 1646(1947).

In the case at hand, Appellant appeared untimely and then failed to establish an interest or right in the action as required by the prevailing principles for intervention. If Federal or General Sessions Civil Rule 24 is applicable, it must be borne in mind that the notes to the new rules indicate that the interest of the applicant for intervention in the proceeding should be clearly related (directly or indirectly) to the subject matter of the action and that it should be a substantial one. Appellee submits that Appellant did not establish any substantial relationship to the possessory action below except that of an occupant of the real property involved. Had she been allowed to intervene, the trial could not have permitted her to retain possession of real property which she occupied without right because[14] of the relevant statute and case law.

In the case at hand, the trial court in the exercise of its discretion with respect to the oral motion to Intervene could not ignore the Connor and Union

14. See Section 45-910, D. C. Code(1951 ed); Spruill v. Brooke, supra, and Scott v. H. G. Smithy Co., supra, discussed in Section A of Appellee's brief.

Provision and D Corp. decisions, both cited supra. The Appellant could not evade them. Those decisions clearly rendered the appeal untenable as a matter of law. Accordingly, the appeal was properly dismissed by the District of Columbia Court of Appeals.

CONCLUSION

A Motion to Dismiss this case as moot is presently pending in this Court. Appellee submits that this case should be dismissed for the reasons set forth in that Motion, Appellant having voluntarily vacated the premises for which possession was sought. No other relief was sought by Appellee in the action below.

However, in the event the Court should reach the merits of this appeal, the only question for review is whether the D. C. C. A. erred in dismissing an appeal from the trial Court's denial of a stranger's post judgment oral motion to intervene in a landlord-tenant action for possession. The propriety of that ruling depends upon whether or not the trial court abused its discretion in denying that motion, which it clearly did not. Therefore, the appeal was properly dismissed by the District of Columbia Court of Appeals and its ruling should be affirmed.

Respectfully submitted,
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CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing Brief for Appellee was mailed, postage prepaid this 4th day of August, 1970, to C. Christopher Brown, Esquire, Attorney for Appellant, 416 Fifth Street, Northwest, Washington, D. C., 20001.

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